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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1085

CHYRL MERTH (OVENS) ALLISON, *Petitioner,*

v.

JAMES M. OVENS, JR., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioner prays that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Arizona entered in the above-entitled case under date of January 10, 1968, and filed in the Superior Court of the State of Arizona In and For the County of Maricopa of January 12, 1968.*

* Under Arizona practice, the written opinion of the Arizona Supreme Court is not the judgment of that Court. The judgment is contained in the mandate issued by the Clerk of the Arizona Supreme Court and forwarded to the trial court under Rule 14(a) of the Arizona Supreme Court Rules. See *Borrow* v. *El Dorado Lodge, Inc.* (1953), 75 Ariz. 218, 254 P. 2d 1027; Charles C. Bernstein, "The Disposition of Civil Appeals in the Supreme Court," 5 Ariz. Law Review 175, 191-192 (1963).

CITATIONS TO OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the Arizona Superior Court for the County of Maricopa, dated September 13, 1965, have not been officially or otherwise reported, and are set forth in Appendix A hereto.

The opinion and decision of the Supreme Court of Arizona in certiorari proceedings concerning the fixing of a supersedeas bond, rendered October 28, 1965, are reported at 99 Ariz. 99, 407 P. 2d. 69, and appear in Appendix B hereto.

The opinion and decision of the Arizona Court of Appeals, Division One, rendered December 29, 1966, affirming the Arizona Superior Court's judgment of September 13, 1965, are reported at 4 Ariz. App. 496, 421 P. 2d 929, and are reproduced in Appendix C hereto.

The Order of the Arizona Supreme Court dated March 29, 1967, granting a Petition for Review, has not been reported and appears in Appendix D hereto.

The opinion and decision of the Supreme Court of Arizona filed on November 22, 1967, affirming in part and reversing in part the decision and judgment of the Arizona Court of Appeals, Division One, are reported at —— Ariz. ——, 433 P. 2d 968, and are contained in Appendix E hereto.

The Order of the Arizona Supreme Court dated January 9, 1968, denying a timely petition for rehearing and applications for a stay is unreported and appears in Appendix G hereto (the petition for rehearing, etc., appearing in Appendix F).

The mandate (i.e., judgment) of the Arizona Supreme Court dated January 10, 1968, is not reported and appears in Appendix H hereto

JURISDICTION

The final judgment of the Supreme Court of the State of Arizona was issued January 10, 1968 (Appendix H hereto). Mr. Justice William O. Douglas, upon application of counsel for petitioner and stipulation of counsel with respect thereto, entered an Order dated January 26, 1968, staying execution and enforcement of the Arizona Supreme Court's judgment pending this Court's consideration of this petition, provided it be filed on or before February 5, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since a right, privilege and immunity was claimed under the Constitution of the United States and was denied by the judgment below.

QUESTIONS PRESENTED

1. Under the First and Fourteenth Amendments to the United States Constitution, may a State court require a mother to send her children only to private, sectarian schools controlled by the Church of her divorced husband, and thereafter assert her failure to obey such requirement as a basis for taking her children away from her?

2. Under the First and Fourteenth Amendments to the United States Constitution, and where parents have been previously divorced, may a State court years later take custody of minor children away from their mother and give it to the father because, in whole or in part, the mother has refused to send the children to schools

operated by the father's Church, which is not her faith, and has failed to require the children to attend church on Sunday?

3. Under the First and Fourteenth Amendments to the United States Constitution, may a State court modify the child support requirements of a divorce decree so that college-age minor children will not receive any financial support during the school year unless they agree, against their wishes, to attend a Catholic college?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, U. S. Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, * * *."

Fourteenth Amendment, U. S. Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, a registered nurse, and respondent, a successful surgeon, were married on January 19, 1941. Shortly prior to their marriage, petitioner had converted to respondent's Roman Catholic faith.

From 1941 to June 29, 1956, the parties became the parents of ten children. Petitioner suffered a hysterectomy following the birth of her last child. Thereafter, in July, 1957, the parties established an $80,000.00 — $90,000.00 irrevocable trust fund from their community property, naming all ten children as beneficiaries. The trust expressly provided:

> "The purpose of this trust is to provide for the education of the beneficiaries in college or professional schools, particularly the sons; provided, however, that the education of said beneficiaries shall be in Catholic colleges, universities, professional schools or other places of learning or education, unless the curriculum they follow is not given in a Catholic institution of learning and, in such case, they may be educated in a non-Catholic institution." (Paragraph IV of Exhibit to Inventory filed Nov. 10, 1958).

On March 31, 1958, petitioner filed suit for divorce in the Superior Court of Arizona for Maricopa County (Phoenix), seeking custody of the ten children and alleging she was a fit and proper person to have their care, custody and control. Respondent admitted petitioner was such a fit and proper person and stipulated that she should have temporary custody pending final hearing.

On December 12, 1958, after a trial, the Superior Court rendered its Judgment and Decree of Divorce finding that the grounds for divorce alleged by petitioner had been proved and were true, and that petitioner was in all respects a fit and proper person to have the care, custody and control of the minor children subject to reasonable rights of visitation in the respondent. A final and absolute divorce was granted

to petitioner, and she was awarded custody of the minor children "except that in accordance with the agreement of the parties, Michael Ovens, the eldest son of the parties, may live with either of the parties as he, Michael, may choose, * * * " (Paragraph 2, page 4, of Judgment and Decree of Divorce). Support in the amount of $100.00 per month per child was awarded to petitioner from respondent. Michael, then age 16, chose to live with respondent.

Petitioner remarried very shortly after the divorce. Three months later respondent petitioned the Court to modify the decree by awarding him "the exclusive care, custody, control and education of the minor children of the parties hereto under the age of fourteen (14) years, and by reducing the amount of support money payments to plaintiff accordingly." (Petition for Modification of Decree of Divorce, filed March 11, 1959.) This would have meant transferring custody of seven children ranging in ages from 3 to 13 to respondent, leaving two daughters, ages 15 and 17, with petitioner.

Petitioner, of course, opposed the attempt to modify the decree. She pointed out that insofar as there was objection to her new husband, she had instituted annulment proceedings against him.*

After trial in May, 1959, the Superior Court of Arizona again expressly found the petitioner to be a fit and proper person to continue in the care, custody and control of the minor children. Respondent's application to change custody of all the children under 14 years of age was denied.

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* Petitioner's brief marriage to her second husband did serve, however, to relieve respondent very promptly from his obligation to pay $300 per month alimony to petitioner.

But the Court went further. After noting that during their married life the parties had both been of the Catholic faith, the Court expressly stated its view "that the children should continue to be educated in accordance with Catholic precepts and in Catholic schools as originally contemplated by the parties * * *." (Order dated June 18, 1959, and filed July 1, 1959). Accordingly, the Court directed petitioner as follows:

> "It Is Further Ordered by this Court that the plaintiff maintain the said children in their present schools or in other suitable Catholic Parochial Elementary and Secondary Schools where she may live, provided that the defendant shall pay, in addition to the amounts heretofore ordered and adjudged to be paid, all necessary amounts for books and tuition incurred at the said schools."

Meanwhile, petitioner changed her religious beliefs and departed the Catholic faith, apparently adopting views akin to the Unitarian faith, but not formally joining any organized church. And in the fall of 1962, she enrolled one son, Kevin, age 12, in the Arizona public schools.

Respondent promptly instituted contempt proceedings against petitioner for violating the Court's order as quoted above, and again petitioned to modify the custody provisions of the divorce decree. Petitioner filed a counter-petition seeking to have the Court remove its requirement that the children in petitioner's custody be maintained in parochial schools. Hotly contested litigation followed, resulting in an Order filed September 23, 1963, transferring custody of three children (Laurel, age 20; Patrick, age 15; and Dennis, age 14) to respondent; expressly holding that re-

spondent was not relieved from his duty to support Janell, age 18, by the trust agreement of July, 1957, "should Janell decide to enter a non-Catholic college;" and leaving the Court-ordered requirement on petitioner to send the children to parochial schools undisturbed and, in fact, unmentioned.

Peace reigned for about a year under this 1963 decree. Both parties remarried during this period. Respondent then instituted the current proceedings by Petition for Order Modifying Divorce Decree and Former Order of the Court, filed December 8, 1964. Respondent for the third time sought a change in the existing custody provisions and expressly asserted, as one of the grounds in support thereof, that petitioner was in violation of the Court's June, 1959, order because she had removed two sons, Kevin and James, from parochial school and entered them in public school. In addition, respondent sought to be relieved from the $100.00 per month support requirement for a 17-year-old daughter, Claire, who had declined to attend a Catholic college and therefore was not receiving funds under the 1957 private trust agreement.

Petitioner on December 21, 1964, filed her response to this latest effort to take her children away, admitting that she had removed Kevin and James from the parochial school they were attending. She expressly claimed "that this Court is without power or authority to enter any order with respect to religion or school provided said children attend some school." (Paragraph III, page 2, of Response to Petition for Order Modifying Decree filed December 24, 1964.) In regard to Claire's refusal to attend a Catholic college, petitioner asserted that "this Court has previously ruled that it was powerless to force the provisions of the

Trust Fund." (Paragraph V, page 2, of Response filed December 24, 1964).

After further pleadings, charges, and counter-charges, the controversy came on for trial during June-August, 1965. During the trial, petitioner's slightly unconventional religious beliefs and practices were thoroughly and repeatedly examined, explored, justified, attacked, and contrasted with respondent's. (See, e.g., pp. 77-80, 84-87, 130-134; 157-158; 174-181, 185-186, 189-191, 340-343, 355, 395-400, 404-408, 651-652, 658, 690-692, 800-802, 833-834 of the trial transcript.) The thread of religious controversy runs throughout the warp and woof of the proceedings. Upon objection by petitioner's counsel that "we are getting into religious things right now," the Court stated that it was "concerned" with whether the children "are getting an *appropriate* religious training." (p. 84, Vol. I, transcript of trial; emphasis added.)

On conclusion of the trial, the Court on September 13, 1965, adopted respondent's proposed findings of fact and conclusions of law and rendered judgment for respondent, taking the care, custody and control of Kevin (age 14), Terrance (age 11), and James Brian (age 9), away from petitioner, and giving it to respondent. In addition, the Court expressly provided that as to the two college-age minor daughters who remained with their mother, "the defendant father should not be required to pay child support to Clare [sic] and Janell Ovens, since they have the option of attending college under the provisions of the trust agreement set up by the parties for their support, education, and welfare." Claire, who had elected to attend a non-Catholic college (Phoenix College) in her home town, was thereby cut off from

all support under the divorce decree and could obtain support under the trust agreement and the Court's judgment only by involuntarily transferring from a non-Catholic to a Catholic college.

As a basis for these rulings, the Court made repeated findings of fact concerning the parties' religious beliefs and practices (see Appendix, pp. A-1-A-4, A-20), including an express finding on the formal charge made in respondent's petition that petitioner had violated the Court's order requiring her to keep her children in parochial schools:

> "(h) That Plaintiff-Respondent has failed and refused to comply with the order of this Court, dated June 11, 1959, which required Plaintiff to maintain the minor children in parochial elementary and secondary schools." (Appendix, p. A-2).

For further example, in finding of fact "b)", the Judge found the home enviroment of respondent father good in part because the children were "taken to church each Sunday" (Appendix, p. A-1), while in finding "e)" (Appendix, p. A-2), he found that in petitioner's home "the children are not taken to church on Sunday;" and the Judge again commented favorably on the church-going habits of respondent father in finding of fact "i)".

Although without power to do so under Arizona law, the trial court ordered the custody of the children changed *forthwith,* and set supersedeas bond in the amount of $50,000.00, an amount beyond petitioner's ability to post. Petitioner immediately appealed the final judgment, and by resort to extraordinary writs obtained both a stay of the trial court's judgment and

a reduction in the supersedeas from $50,000.00 to $4,000.00, which she posted.

In her appeal, it should be noted, petitioner did not challenge the change of custody of her son Terrance, believing that he voluntarily and freely did wish to reside with his father. The appeal, therefore, involved only the custody change of Kevin and James Brian, and the cut off of support for Claire, who had chosen to attend a non-Catholic college, and of Janell, who was not so immediately affected, since she was attending a Catholic college in Hawaii.

On appeal, petitioner vigorously asserted that the action of the Superior Court was in violation of rights protected by the First and Fourteenth Amendments to the U. S. Constitution. The Court of Appeals considered this contention at length (Appendix, pp. A-19-A-23), passed upon its merits, and rejected it. The judgment of the trial court was affirmed in all respects (Appendix C, pp. A-12-A-24).

Petitioner sought review by the Arizona Supreme Court and such review was granted (without further briefing or argument allowed) on March 29, 1967 (Appendix D, p. A-25). After reviewing the cause, the Arizona Supreme Court renderd its opinion on November 22, 1967, affirming in part and reversing in part (Appendix E, pp. A-26-A-32). The part of the lower court's decision that was reversed concerned only the power of the lower court to make a change of custody effective during appeal. The Supreme Court on this point ruled in accord with its earlier decision concerning supersedeas (Appendix B, pp. A-7-A-11) that the trial court had no such power if supersedeas

was posted.* In all other respects, the judgments of the lower courts were affirmed. The Arizona Supreme Court did not discuss or refer to the Constitutional issues concerning religion.

Petitioner filed a timely petition for rehearing (Appendix F, A-33-A-37), in which petitioner also sought, if necessary, a stay pending review by this Court or pending application to this Court for a stay. The petition for rehearing and stay applications were denied on January 9, 1968 (Appendix G, p. A-38), and the mandate (i.e., judgment) of the Arizona Supreme Court issued forth on January 10, 1968, and was filed in the trial court on January 12, 1968 (Appendix H, pp. A-39-A-40). Meanwhile, the status quo was preserved pending petitioner's prompt application to Mr. Justice Douglas for a stay pending review by this Court on certiorari. On stipulation of the parties, Mr. Justice Douglas entered a stay of the Arizona Supreme Court's judgment by Order of January 26, 1968, provided this petition for a writ of certiorari be filed by February 5, 1968.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioner relies upon the following reasons why the petition for a writ of certiorari should be granted in this case:

Important and substantial issues of federal constitutional law are here presented involving the fundamental freedoms of the First Amendment. The deci-

* The Court pointed out, of course, that if necessary, the custody of the children could be changed pending appeal by application to the appellate court or through juvenile proceedings (Appendix E, p. A-31).

sions of the Arizona courts below, refusing to recognize the claimed federal rights, are in conflict with other state court decisions on the same or related issues and, petitioner submits, in conflict with controlling First Amendment decisions of this Court. The setting of the problem—i.e., child custody cases—is one which arises frequently and continually in every jurisdiction of the nation. The questions presented concerning application of the First and Fourteenth Amendments to court rulings in such cases on the subject of religious education of the children involved, are questions which should be settled by this Court.

The record here demonstrates in stark outline that petitioner has been disqualified, at least in part, because she has failed to maintain her children in religious schools of a particular sect where they would receive religious training contrary to her (and the children's) beliefs, and because she has failed to require attendance by the children at formal church ceremonies on Sunday.* The record further shows that she has lost the right to receive financial support for a minor daughter in her custody because she refuses to compel that daughter to attend a sectarian college against the daughter's wishes.

Surely, such action by a state (or federal) court presents serious First Amendment questions that require this Court's attention and resolution. Petitioner

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* Although constitutionally irrelevant, petitioner testified without contradiction that she is not an atheist or agnostic, that she does believe in God, but does not belong to a church, and that she does instruct her children on religious matters at home (pp. 157-158, transcript of trial).

submits the court action here at issue is in flat violation of both the "freedom of religion" and the "establishment" clauses of the First Amendment.

As this Court stated in *Everson* v. *Board of Education of Ewing Tp.*, 330 U.S. 1, 15-16 (1947):

> "The 'establishemnt of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will* or force him to profess a belief or disbelief in any religion. *No person can be punished* for entertaining or professing religious beliefs or disbeliefs, *for church attendance or non-attendance.* * * *" (Emphasis added.)

Here, petitioner submits, the Arizona courts have first expressly and in so many words purported to require petitioner to maintain her children in private schools operated by a particular church for the purpose of teaching secretarian religious beliefs. See *Everson* v. *Board of Education of Ewing Tp., supra,* dissenting opinion of Mr. Justice Jackson, 330 U.S. 22-24; and transcript of trial, pp. 174-175. Secondly, upon petitioner's failure to so maintain her children, the Arizona courts have specifically "found" such failure as a fact in support of taking petitioner's children from her.

Such action by a State court simply cannot be squared with the above-quoted language from the *Everson* decision, nor we submit with the First and Four-

teenth Amendments. Not only does such state action aid one religion and prefer that religion over another; it likewise abridges the individual's religious freedom by requiring religious attendance and by "punishing" for religious non-attendance.

Significantly, both the majority and dissenting opinions in *Everson* drew heavily upon Madison's Remonstrance as a guidelight for interpretation of the First Amendment's sparse phrasing. Paragraph 5 of the Remonstrance is particularly here applicable:

> "5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation."

Here too, petitioner submits, the Arizona courts have established themselves as judges of religious truth and have employed religion as an engine of civil policy.

Nor does the presumption indulged in by the Arizona Court of Appeals (i.e., that the specific and repeated findings on petitioner's religious beliefs and practices, made by the trial court, were peripheral and not the basis, in whole or in part, of the trial court's judgment divesting petitioner of the custody of her children) eliminate the Federal Constitutional issues here involved. In the first place, the presumption is a violent one which assumes that the trial court was indulging in irrelevancies in making, repeatedly, the findings it did concerning the parties' religious beliefs

and practices — findings which were in response to pleaded charges and which were specifically set forth as the basis for the trial court's conclusions of law and its judgment. Secondly, the presumption itself was based in part on invalid, *in camera* proceedings from which petitioner was excluded and of which no record was made. (See Appendix C, p. A.22-A.23.) Certainly, the preferred place given in our scheme to the great democratic freedoms secured by the First Amendment cannot be defeated and destroyed by indulgence in such dubious "presumptions." This Court, in cases involving First Amendment freedoms, has always reserved to itself the right to examine independently the record and not be bound by such intermediate state court "presumptions." See *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152; *Thomas* v. *Collins,* 323 U.S. 516, 530.

The bald and inescapable fact presented by this record is that petitioner's religion, or lack of religion —i.e., her creed—has been charged in the trial court below and has been expressly found by the trial court below to be a basis for taking her children away from her, and to be a basis for cutting off support for a daughter who remains in her custody. This result is contrary to the prohibitions of the First and Fourteenth Amendments, and to this Court's decisions in the *Everson* and later cases. See *McCollum* v. *Illinois,* 333 U.S. 203 (1948); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *Abington School District* v. *Schempp,* 374 U.S. 203 (1963).

The decision in this case is also contrary to the First Amendment holdings of many of the state courts

arising in child custody cases. One of the most exhaustive treatments of the problem is found in *Hacket* v. *Hacket* (1958 Ohio App.), 150 N.E. 2d 431, appeal dismissed 168 Ohio St. 373, 154 N.E. 2d 820.* In *Hacket,* the Ohio court said:

> "Coming directly to the point to be decided, it is our conclusion that the provisions of the separation agreement, dealing with the promise of the mother to see to it that the daughter placed in her custody be reared in the Catholic faith and attend a school affiliated with the Catholic Church, cannot be enforced by judicial decree." 150 N.E. 2d at 434.

Hacket was decided on strict constitutional principles:

> "The force of this provision is to make observance of religious doctrine a matter of personal choice uncontrolled by law *or decree of court.*" 150 N.E. 2d at 433. (Emphasis added.)

See, also, *Wood* v. *Wood,* 39 D. Ch. 523, 168 A. 2d 105; *Boerger* v. *Boerger,* 26 N.J. Super. 90, 97 A. 2d 419; *Smith* v. *Smith,* 90 Ariz. 190, 367 P. 2d 230; *McLaughlin* v. *McLaughlin,* 20 Conn. Sup. 278, 132 A. 2d 420; *Stanton* v. *Stanton,* 213 Ga. 545, 100 S.E. 2d 289.

The glaring conflict between the decision in this case and the above decisions of other state courts on the First Amendment issues here presented, requires resolution by this Court.

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* This case was cited in *Abington School District* v. *Schempp, supra,* concurring opinion of Mr. Justice Brennan, 374 at 243-244, n. 9.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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By: .....
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Certificate of Service

I Hereby Certify that three true copies of the foregoing Petition for a Writ of Certiorari and Appendix thereto were mailed air mail, postage prepaid, to Charles M. Brewer, Esq., 216 Luhrs Building, Phoenix, Arizona, 85003, this 5th day of February, 1968.

NEAL P .RUTLEDGE

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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APPENDIX A

SUPERIOR COURT OF MARICOPA COUNTY'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter having come on regularly for hearing before the Court on the 28th and 29th days of June, 1965, and thereupon adjourned to the 24th, 25th and 26th days of August, 1965, and the Court having heard the evidence and argument of counsel, took the matter under advisement, and now, being fully advised in the premises, makes findings of fact, conclusions of law, and enters judgment as follows:

FINDINGS OF FACT

That substantial changes have occurred concerning the proper parent to have custody of the minor children of the parties herein since the order of this Court, dated June 11, 1959, in the following particulars:

a) The Defendant-Petitioner since September 23, 1963 has re-married; his present wife Vivian, formerly a widow, is a respected and highly regarded housewife and maintains a very orderly house for the Ovens children and appears to be devoted to said children, not having had any children of her own.

b) The environment of the Ovens home is conducive to a wholesome life for the minor children; they are helped with their school work, taken to church each Sunday and reside in the home and neighborhood in which they were originally reared and in wholesome surroundings.

c) The Plaintiff-Respondent, since her divorce from the Defendant, has developed a pattern charactarized [sic] by associating with and did marry two men with criminal records and is presently living with her third husband, who has a criminal record and said last marriage of the Plaintiff occurred since September

23, 1963; that such a stepfather is not conducive to developing minors into good citizens and is detrimental to their individual welfare.

d) The Plaintiff, who presently has custody of Kevin, James Brian and Terrance, had permitted her present husband R. J. Allison to live at her home prior to their marriage.

e) The present home life of said minors, above named, is not conducive to a well-balanced life in that excessive drinking is indulged in in said home; the children are not taken to church on Sunday; obscene language is used in their presence, and there is a definite lack of proper parental guidance.

f) That Terrance was ill on many occasions while in the Allison home, missed many days at school and did very poorly in school until he commenced to live with the Defendant and his present wife about November 1, 1964; that Terrance is now doing well in school, appears to be happy and well adjusted in the Ovens home.

g) That Kevin Ovens is in need of Psychological and Psychiatric Evaluation by a competent practicing child phychiatrist.

h) That Plaintiff-Respondent has failed and refused to comply with the order of this Court, dated June 11, 1959, which required Plaintiff to maintain the minor children in parochial ~~and secondary~~ elementary schools.

i) The Ovens children living with Defendant are adequately clothed and well groomed as contrasted to the Ovens children living with the Allison family, who when visiting in the Ovens home have to be furnished ample and clean clothing so they can attend church and likewise when taking trips with the Ovens children who reside with the Defendant.

2. The Court finds that the parties hereto have entered into an irrevocable express trust prior to their divorce of December 12, 1958, in which there now appears to be funds in the approximate amount of $90,000 for the higher education of the children of

the parties herein, which trust was created from community property and provides that the children shall attend a Catholic college if they are able to procure their desired curriculum at a Catholic college; otherwise, they may attend any other college and use funds from the trust for that purpose.

That Clare Ovens, while once enrolled in the fall of 1964 in a Catholic college, later withdrew her application and attended Phoenix Junior College.

Following the marriage of the Plaintiff and R. J. Allison in August, 1964, Clare Ovens was seen alone in the company of R. J. Allison late at night, in a compromising position, and on other occasions was observed in a night club dancing with said stepfather.

That Jennell attended a Catholic college in Hawaii during 1964, and all expenses in connection therewith were paid from the trust.

That Michael Ovens has been attending a Catholic college and his expenses have been paid from said trust.

That the Defendant-Petitioner takes the position that if the provisions of the trust are not followed by the older children, now ready for college, that he should not be required to pay the sum of $100 per month during the school year.

The Plaintiff-Respondent takes the position that she and the college-age girls can disregard the trust, which she has jointly executed, and if the children don't abide by the terms of the trust, that the Defendant still has to pay $100 per month for the entire year.

That this Court further finds that it would not be equitable for Defendant Ovens to be required to furnish college support money twice for the children. That the trust provides for support, maintenance and educational funds for the benefit of the children of the parties, as is set forth in paragraph 10 of the original decree entered in this Cause on December 12, 1958.

That the children of the parties Clare and Jannell may choose their own college but required to make the financial arrangements.

That this Court should not require the Defendant to provide funds for any other school not covered under the Trust Agreement.

CONCLUSIONS OF LAW

That during the summer months, when school is not in session, the Defendant should continue to pay $100 per month support money until further order of the Court for Clare and Jannell.

The Court concludes, based on the findings of fact set forth heretofore that:

1. That the circumstances shown by the proof to this Court require modification of the decree of June 11, 1959, modifying said decree with respect to the care, custody and control of the minor children, Terrance, James Brian, and Kevin.

2. That the best interests and welfare of the minor children, Kevin, James Brian and Terrance, requires that they be awarded to the defendant father, effective forthwith, with reasonable visitation privileges to the mother-plaintiff herein.

3. That support payments of said children shall terminate as of August 30, 1965.

4. That the welfare of Kevin requires that he be submitted to a psychiatrist selected upon stipulation by counsel for the parties, subject to the approval of this Court.

5. That Kevin shall remain a ward of the Court, until further order pending the results of said examination.

6. That the defendant-petitioner shall pay respondent-plaintiff's counsel fees in the sum of $250; that the remaining attorney's fees due respondent-plaintiff's attorney shall be paid by the plaintiff, together with her costs expended thereon.

7. That it is absolutely essential, in of the minor children, Terrance, James Brian, and Kevin, in the event of an appeal,

that they be temporarily awarded to the custody of the defendant father herein, pending said appeal, and in furtherance thereof, until a final determination may be made.

JUDGMENT

In accordance with the foregoing findings of fact and conclusions of law,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the order of the Court of June 11, 1959, at line 12 of page two and at line seven, page five, be further modified and changed in the following particulars:

> "That the care, custody and control of the minor children of the parties, to-wit, Kevin, James Brian and Terrance Ovens, be and hereby is awarded to the defendant father, James Ovens, with reasonable visitorial rights to the mother-plaintiff, Chryl Ovens."
>
> * * *
>
> "That the defendant shall pay to the plaintiff as and for the support and maintenance of the minor children of the parties the sum of $200 per month for each child of the parties in the custody of the plaintiff pursuant to the order of this Court,"

$100

be and it is hereby amended not to require the defendant father to pay child support for the children awarded to him, to-wit, Kevin, James Brian, and Terrance Ovens, and further, that the defendant father should not be required to pay child support to Clare and Jannell Ovens, since they have the option of attending college under the provisions of the trust agreement set up by the parties for their support, education and welfare.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pending any appeal that may be filed, that the care, custody and control of the minor children, Terrance, James Brian, and Kevin, be awarded to the defendant father, in furtherance of any appeal that might be taken herefrom, in order to guard the health, safety and welfare of the heretofore mentioned children, until a final determination may be made.

That the costs of this action be taxed against the individual parties, and that defendant pay unto plaintiff's counsel $250 as and for attorney's fees.

DATED this 13 day of September, 1965.

/s/ Kenneth C. Chatwin
Judge of the Superior Court

Copy of the foregoing received this
13 day of September,1965:

/s/ John Dickinson
John Dickinson,
Attorney for Plaintiff

/s/ Charles M. Brewer
Charles M. Brewer,
Attorney for Defendant

APPROVED AS TO FORM this 13 day
of September, 1965:

/s/ John Dickinson
John Dickinson
Attorney for Plaintiff

/s/ Charles M. Brewer
Charles M. Brewer
Attorney for Defendant

[Vol. 1034, pp. 236-242]

(FILED: September 13, 1965)

APPENDIX B

407 P.2d 69
99 Ariz. 99

Chyrl ALLISON, Petitioner

vs.

Hon. Kenneth CHATWIN, Judge of Superior Court, County of Maricopa, Arizona and James Ovens, Jr., Real Party in Interest, Respondents.

No. 8687.

Supreme Court of Arizona.
In Division.
Oct. 28, 1965.

Petition for writ of certiorari to review decision fixing supersedeas bond. The Supreme Court, McFarland, J., held that supersedeas bond in amount of $50,000 in child custody case between parents was excessive and unreasonable under circumstances and $4,000 would be reasonable amount.

Ordered that respondent approve supersedeas bond in amount of $4,000 and approve same both as supersedeas and appeal bond.

* * *

Lewis, Roca, Scoville, Beauchamp & Linton, by John J. Flynn and James Moeller, John J. Dickinson, Phoenix, for petitioner.

Robert K. Corbin, County Atty., for respondent Judge.

Charles Brewer, Herbert Mallamo, Phoenix, for respondent Ovens.

McFARLAND, Justice.

This is a petition for a writ of certiorari to review a decision of the Honorable Kenneth Chatwin wherein he fixed a supersedeas bond in the amount of $50,000 in a child-custody proceeding.

Petitioner and James M. Ovens, Jr., were divorced in Maricopa County in 1958, at which time petitioner Chyrl Allison, was awarded custody of the ten minor children, who were the progeny of that marriage. The proceedings involved in this application for the writ of certiorari concern only three of the children—viz., Kevin, James Bryan, and Terrance. Upon a petition for a change of custody, respondent court, Honorable Kenneth Chatwin, entered an order dated August 27, 1965, which was later reduced to formal judgment on September 13, 1965, transferring custody of these children from the petitioner-mother to the respondent-father, James M. Ovens, Jr. That order of August 27, 1965, provided that custody of the children was to be surrendered August 31, 1965.

Counsel for petitioner immediately filed a notice of appeal and petition to fix supersedeas bond, and was advised by the respondent court that counsel would be informed as to whether or not there would be a hearing on the supersedeas bond setting. Counsel for petitioner offered to post an appeal bond immediately, which was refused. Counsel for petitioner immediately applied to the Court of Appeals, Division One, for writ of mandamus and writ of prohibition. The Chief Judge of the Court of Appeals entered an order staying all further proceedings in the cause below until such time as the Court of Appeals had an informal hearing, which was set for September 22, 1965, or until such time as the trial court fixed supersedeas bond in a reasonable amount.

During this time counsel for respondent Ovens was proceeding by habeas corpus to secure custody of the children. On September 14, 1965, respondent Judge Chatwin conducted a hearing, and thereupon set supersedeas bond in the sum of $50,000.

Petitioner filed this writ of certiorari to review the proceedings, in which the $50,000 bond was set, alleging that the same was unreasonable and an abuse of discretion on the part of the respondent court.

In Bailey v. Superior Court, 97 Ariz. 293, 399 P.2d 907, the lower court had granted a change of custody for a minor child. In discussing the proceedings in the lower court, in regard to the granting of a supersedeas bond, we said:

"On November 30, 1964, Judge Ogg signed and filed a formal written judgment in this matter, and on that same date, the petitioner filed a notice of appeal and a supersedeas bond. The respondent filed his objections thereto, supported by an affidavit and a memorandum. On December 7, 1964, after oral argument, the court entered an order denying the bond as a supersedeas bond and allowing the bond in the sum of $250.00 as a cost bond only. Thereafter, this application for a writ of mandamus was filed." 97 Ariz. at 294, 399 P.2d at 908.

In ruling upon the case, we stated:

"The application for the writ of mandamus to fix and approve the supersedeas bond should be granted. The facts of the present case fall squarely within the ruling laid down by this court in the case of Gotthelf v. Fickett, 37 Ariz. 322, 294 P. 837, wherein it was stated that the effect of the supersedeas bond was merely to preserve the status quo, and not to undo any act already done in pursuance of the order superseded. But there was no execution in pursuance of the order appealed from and for which the supersedeas bond was applied.

"In Application of Lavis, 96 Ariz. 316, 394 P.2d 655, we again held that the signing of supersedeas bond stayed the execution in regard to custody of children:

" 'When a notice of appeal and a supersedeas bond is given, the superior court loses all further jurisdiction in the case except in furtherance of the appeal. Gotthelf v. Fickett, 37 Ariz. 322, 37 Ariz. 413 On Rehearing, 294 P. 837. Further, the approval of a supersedeas bond in an amount fixed by the court and conditioned in the language of the statute, is a ministerial duty of the court and not a matter of discretion. See Gotthelf, supra. * * *'

"Legal custody of the minor child was in the mother at the time the judgment was signed and filed. She is therefore entitled to the custody of the minor child, and it is hereby ordered that

she continue said custody pending appeal, and the order of November 30, 1964, is entirely superseded.

"It is therefore ordered that the alternative writ of mandamus heretofore issued be made permanent. It appearing that the refusal of the superior court to approve the bond submitted as a supersedeas bond was based on grounds other than its conditions or sufficiency, it is hereby ordered that respondent approve the same as both a supersedeas and an appeal bond." 97 Ariz. at 295, P.2d at 909.

[1] As we stated in the Bailey case, supra, when an appeal is filed in a case in which custody of children is changed by the lower court, it is the duty of the court upon application to fix a supersedeas bond, the purpose of which is to preserve the status quo of the case pending appeal. The court in the instant case, in its order changing the custody of the children, stated:

"That it is absolutely essential, in order to guard the safety, welfare and care of the minor children, TERRENCE, JAMES BRYAN, and KEVIN, in the event of an appeal, that they be temporarily awarded to the custody of the defendant father herein, pending said appeal, and in furtherance thereof, until the final determination be made."

[2] It is not within the power of the lower court to award custody of children temporarily pending appeal. This court has held that in the filing of a supersedeas bond, the case shall merely be held in status quo, and the bond shall have no retroactive effect so as to undo or invalidate any act already done. In Application of Lavis, 96 Ariz. 316, 394 P.2d 655; Gotthelf v. Fickett, 37 Ariz. 322, 294 P. 837, on rehearing, 37 Ariz. 413, 294 P. 837.

[3, 4] The purpose of the supersedeas bond is to afford the party appealing from a lower court order to stay any further proceedings in the cause being appealed until such time as the appeal has been ruled upon by the reviewing court. Therefore, the lower court, upon notice of appeal, should determine as quickly as possible the amount of the supersedeas bond, stay execution for a reasonable time to permit the party appealing to post the bond,

and thereby stay and preserve the status quo. Otherwise the effect might be to render nugatory the purpose of the supersedeas bond. Any other procedure would mean that the whole living conditions and routine of the children would be disturbed by such a transfer in the event the court reversed the lower court's ruling in regard to the custody of the children.

[5, 6] Petitioner was unable to give a bond as large as $50,000, and by the fixing of this large bond the court defeats the purpose of a supersedeas bond and prevents holding the case in status quo. Rules of Civil Procedure, Rule 73 (1), A.R.S., 16 A.R.S., provides that the amount of the supersedeas bond should be "conditioned that the appellant will pay to the opposite party all damages which such party may sustain by the suspension of the order or the stay of proceedings." A bond should be no larger than an amount necessary to give this assurance. We find that $50,000 was excessive and unreasonable under the circumstances, and $4,000 would be a reasonable amount.

It is hereby ordered that the respondent approve the supersedeas bond in the amount of $4,000, and approve same both as a supersedeas and appeal bond.

LOCKWOOD, C. J., and UDALL, J., concurring.

APPENDIX C

421 P.2d 929
4 Ariz.App. 496

Chyrl Merth (Ovens) ALLISON, Appellant,

vs.

James M. OVENS, Jr., Appellee.

No. 1 CA-CIV 310.

Court of Appeals of Arizona.
Dec. 29, 1966.
Rehearing Denied Jan. 26, 1967.

Petition by divorced father to obtain change of custody as to three of his children in custody of mother. The Superior Court, Maricopa County, Cause No. 51803, Kenneth C. Chatwin, J., awarded custody of the three children to father and mother appealed regarding change of custody as to two of the three children.

The Court of Appeals, Cameron, J., held that evidence that mother since her divorce from father had associated with people who had criminal records and had married two such men was admissible within broad discretion of trial court in determining what would be most beneficial for children, although it required consideration by trial judge of evidence upon which a prior adjudication of custody in favor of mother had been made, and that evidence warranted change of custody.

Affirmed.

John J. Dickinson, Phoenix, for appellant.

Charles M. Brewer, Jerry H. Glenn, Herbert Mallamo, Phoenix, for appellee.

CAMERON, Judge.

This is an appeal from the judgment of the trial court modifying a previous decree of divorce respecting the custody of three minor children of Dr. James M. Ovens, Jr., and Chyrl Merth (Ovens) Allison. The three children were awarded to the father and the mother appeals regarding the change of custody as to two of the three children.

We are called upon to determine:

(1). Whether the trial court erred in considering evidence admitted in a prior hearing and adjudication of custody.

(2). Whether the trial court erred in refusing to suspend the rule excluding witnesses from testifying who have sat in the courtroom and watched the proceedings.

(3). Whether the trial judge erred by basing his judgment on facts which the appellant alleges he could not consider under the 1st and 14th Amendments to the Constitution of the United States and Article 20, Part First, of the Arizona Constitution, A.R.S.

(4). Whether the trial court erred and abused its discretion in the amount of attorney's fees awarded to the respondent-mother.

The facts necessary for a determination of this matter are substantially as follows: On 12 December 1958, the 17 year marriage of Chyrl and James Ovens was ended by divorce. Pursuant to the decree of divorce, the plaintiff and mother, Chyrl Ovens, was given custody of the 10 children with the exception of Michael Ovens, then 16 years old, who was granted permission to live with his father. The defendant and father was ordered to contribute $100.00 per month for the suport of each child living with the mother.

On the day her divorce was final, the plaintiff was married in Mexico to one Andre Gerber. She later divorced Gerber and married R. J. Allison, her present husband. The defendant has also remarried.

In 1959, defendant petitioned for change of custody which was denied. The court in that hearing noted that:

"The rancor between the parties themselves has been the principal factor in the difficulties that have arisen."

Again, in 1963, defendant petitioned for a change of custody of the three children, and this time he was awarded custody of three of the children who had previously elected to live with him.

In 1965, defendant again petitioned for a change of custody, and the determination of that matter in the Maricopa County Superior Court gives rise to this appeal. By emancipation, court action, and by the expressed desires of the children themselves, the custody of the children had been changed since the original decree such that at the time of the hearing; two were married and residing outside the home; four were residing with the defendant-father; two were residing with the plaintiff-mother; and two, the subject of this appeal, are residing with the plaintiff pending determination of the matter.

Trial was held in Maricopa County Superior Court in June and August of 1965, and the court, on 13 September 1965, awarded the care, custody and control of the three minor children to the father. The judgment contained the following provisions:

"It is further ordered, adjudged and decreed that pending any appeal that may be filed that the care, custody and control of the minor children Terrance, James Brian and Kevin be awarded to the defendant father in furtherance of any appeal that might be taken herein in order to guard the health, safety and welfare of the heretofore mentioned children until final determination may be made."

The mother immediately filed a notice of appeal and after several motions and writs, the trial court set a supersedeas bond in the amount of $50,000.00. The mother petitioned this Court for a writ of certiorari asking that we order the trial court to allow the mother to post a lesser bond and stay the order changing custody pending appeal. We denied the petition and the mother filed

a writ of certiorari with the Arizona Supreme Court and they, in the case of Allison v. Chatwin, 99 Ariz. 99, 407 P.2d 69 (1965), reduced the bond to $4,000.00 and stated:

> [1] "It is not within the power of the lower court to award custody of children temporarily pending appeal." 99 Ariz. pages 102, 103, 407 P.2d page 71.

And:

> "When an appeal is filed in a case in which custody of children is changed by the lower court, it is the duty of the court upon application to fix a supersedeas bond, the purpose of which is to preserve the status quo of the case pending appeal." Allison v. Chatwin, supra, 99 Ariz. page 102, 407 P.2d page 71.

This decision (Allison v. Chatwin, supra) of the Supreme Court of Arizona was in accord with previous decisions of that Court commencing with Gotthelf v. Fickett, 37 Ariz. 322, 294 P. 837 (1930), in which it has been held that posting of a supersedeas bond stays execution pending appeal of a judgment ordering change of custody of children. This Court has no quarrel with this rule of law as it applies to a change of custody in which the trial court has not found the home from which the children are being removed is detrimental to the health and welfare of the said children. In such a situation, no great damage is likely to be done to the children pending appeal. The situation is quite different, however, when, as in this case, the trial court has found that in order to "guard the health, safety, and welfare" of the children, the children should be removed from a detrimental environment.

Under these circumstances, this Court would question the wisdom in allowing the children to remain in the potentially damaging environment pending appeal by the posting of a supersedeas bond and we are also unable to say that a bond in any amount will suffice to repair the damage that may be done to children kept in the atmosphere described in this case for the period of time it takes to consider a matter on appeal, even though the matter may be accelerated on our calendar as was done here.

The $4,000.00 bond was posted and the two children in question have remained with the mother pending determination of this matter on appeal.

CONSIDERATION BY THE TRIAL JUDGE OF EVIDENCE UPON WHICH A PRIOR ADJUDICATION OF CUSTODY HAD BEEN MADE

The appellant contends that the trial court could not consider testimony which had been introduced in a previous custody hearing. Appellant contends that in considering the question of whether there has been a change of circumstances the doctrine of res judicata must be applied. Appellant cites the following:

> "The change of circumstances rule as a limitation on modification of a divorce decree is one aspect of the principle of res judicata (citations). The court, in issuing the original decree, found that the arrangement, therein set out was for the best interests of the child. No appeal having been taken, this decision became final, *upon the facts then before the court,* and no alteration will be made without a showing that the factual situation has changed to such an extent that the original decree can no longer reasonably be expected to serve the purpose." Ward v. Ward, 88 Ariz. 132, 134, 135, 353 P.2d 895, 898 (1960).

[2] The rule set forth in Ward v. Ward op cit, and other cases that the courts will not consider a change in custody without showing a sufficient change in circumstances is sound in that generally the best interests of the minor children are served by keeping them in the same environment and surroundings during their childhood, and the courts should not change the custody of the children with each slight change of circumstances.

[3] But the fact the prior determination of custody by the court is res judicata as to the circumstances considered by the court at that previous time does not mean that evidence introduced at the prior hearing is necessarily inadmissible at subsequent hearings. Indeed, some matters will have to be shown the court

in order that it may determine if there is in fact a change of conditions since the prior hearings.

[4] In the instant case, the court admitted evidence establishing that both Gerber (plaintiff's second husband) and Mr. Allison (her present husband) possessed criminal records, in order to show what defendant's attorney called, "the propensity of the witness (plaintiff) for men of Mr. Gerber's class." The trial court in its findings stated:

> "The plaintiff-respondent since her divorce from the defendant has developed a pattern characterized by associating with and did marry two men with criminal records and the presence of the present stepfather is not conducive to developing minors into good citizens and is detrimental to their individual welfare."

The trier of fact was being asked to and did draw an inference from the fact that she associated with people who had a criminal record and that she married two such men. We think it was within the broad discretion of the trial court to admit such evidence in determining what would be most beneficial for the children.

REFUSAL OF THE TRIAL COURT TO RELAX THE "RULE" EXCLUDING WITNESSES

At the commencement of the proceeding, the attorney for plaintiff asked that the "rule" be invoked requiring that those who would be witnesses remain outside the courtroom until called and not disclose or discuss their testimony with anyone except counsel.

A private investigator, George Brooks, was called by the defendant and testified that on two occasions he saw one of the Ovens girls in the company of her stepfather Allison in what he described as dating situations. On rebuttal, and to the alleged surprise of plaintiff's counsel, a second investigator testified that he and Brooks on one occasion had gone to the Adams Hotel in an attempt to serve a subpoena. Under circumstances that are not

quite clear, they discovered Mr. Allison and his stepdaughter in the alleyway near the Adams. The investigator testified to have seen the following in the light of his pocket flash:

> "Mr. Allison's back was partly turned to me. The girl * * * was more or less cradled up close to him. She had her head down on his shoulder and in the crevice of his neck. He had his right arm over her shoulder and cupped over her right breast."

After each of these witnesses, counsel for the plaintiff requested leave to call the two Ovens girls to the stand. The following colloquy then took place:—

> "Court: * * * These girls are not the subject of a custody proceeding. The court does not feel and the record may show that there is evidence that there has been discussion among and between the witnesses with one side of this controversy and for that reason the court indicated to counsel that if their testimony is offered the court would likely sustain an objection to it because of the imposition of the rule. * * *
>
> "I doubt that the court would be aided one way or another in talking to these girls in chambers.
>
> "Counsel: * * * I think she * * * should be permitted to take the stand and deny things said in regard to her relationship with her stepfather.
>
> "Court: I would have to insist that counsel could have reasonably anticipated that, and in the preparation of his case would make the proper preparation for this in connection with the rule of exclusion."

No offer of proof appears in the record concerning the Ovens' girl's testimony beyond the statement of counsel that she intended to controvert the testimony of the private detective. Mr. Allison was subpoenaed by the defendant, but failed to appear, and counsel for the plaintiff-mother claimed the marital privilege concerning his possible testimony.

Our Supreme Court has recently discussed the "rule" relating to the sequestration of witnesses in criminal cases as follows:

"Arizona has no statutory provision or criminal procedure rule relating to the sequestration of witnesses during a trial, but this common law practice was followed in our courts before Arizona became a state. Territory of Arizona v. Dooley, 3 Ariz. 60, 78 P. 138 (1889). The purpose of excluding witnesses from the trial is to encourage the discovery of truth, and detection and exposure of falsehood. State v. Thomas, 78 Ariz. 52, 275 P.2d 408 (1954). As we have previously said, exclusion of witnesses from the courtroom and administration of the exclusionary rule is within the sound discretion of the trial judge and this court will not disturb the ruling of the trial court unless there is shown an abuse of discretion and resulting prejudice therefrom. State v. Romero, 85 Ariz. 263, 336 P.2d 366 (1959)." State v. Sowards, 99 Ariz. 22, 26, 406 P.2d 202, 204 (1965).

[5] We believe the same rule applies to civil cases and the trial court may, upon request of one of the parties or his own motion, invoke the "rule" excluding witnesses from the courtroom during trial.

[6, 7] Sequestration of witnesses lies within the sound discretion of the trial judge. Jones, Evidence, (5th Ed.), § 889, page 1664, Wigmore, Sequestration of Witnesses, 14 Harvard Law Review 475, Wigmore, Evidence (3rd Ed.), § 1839, page 337. See Annotation, 85 A.L.R.2d 478. In the instant case, the plaintiff had invoked the rule and had failed to anticipate that they might be called as witnesses which could reasonably be expected in a matter of the kind before the court. The two girls had heard enough testimony to be influenced thereby and the court did not err in excluding their testimony. Gwaltney v. Morris, 237 Md. 173, 205 A.2d 266 (1964).

CONSIDERATION OF RELIGION

The plaintiff next contends that the trial court based its judgment on the religious activities of the parties and that this is contrary to the 1st and 14th Amendments to the Constitution of the

United States and Article 20, Part First of the Arizona Constitution which reads as follows:

"First. Perfect toleration of religious sentiment shall be secured to every inhabitant of this State, and no inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same."

The trial court in its finding of fact found:

"b) The environment of the Ovens home is conducive to a wholesome life for the minor children; they are helped with their school work, taken to church each Sunday and reside in the home and neighborhood in which they were originally reared and in wholesome surroundings.

* * * * * *

"e) The present home life of said minors, above named, is not conducive to a well-balanced life in that excessive drinking is indulged in in said home; the children are not taken to church on Sunday; obscene language is used in their presence, and there is a definite lack of proper parental guidance.

* * * * * *

"h) That Plaintiff-Respondent has failed and refused to comply with the order of this Court, dated June 11, 1959, which required Plaintiff to maintain the minor children in parochial elementary and secondary schools.

"i) The Ovens children living with Defendant are adequately clothed and well groomed as contrasted to the Ovens children living with the Allison family, who when visiting in the Ovens home have to be furnished ample and clean clothing so they can attend church and likewise when taking trips with the Ovens children who reside with the Defendant."

[8] Plaintiff cites the Arizona Supreme Court case of Smith v. Smith, 90 Ariz. 190, 367 P.2d 230 (1961) to support his contention that "neither religion, the lack of religion, nor a person's creed can be constitutionally taken into consideration in a child custody action." We do not read the Smith case to be this inclusive. In the Smith case, the trial court had stated its opinion

that the mother's religious beliefs made her unfit to have the care and custody of the child. Our Supreme Court stated:

> "Patently, the determination of fitness was predicated on appellant's religious beliefs, for in the end the court put appellant to the compulsion of foregoing her beliefs or suffering the loss of her child." Smith v. Smith, supra, 90 Ariz. page 193, 367 P.2d page 233.

This does not prevent the court, in a child custody matter, from taking into consideration the church and Sunday school habits of the children and their respective parents, and the opportunity given to the minor children to attend church when they desire. These matters may well indicate the concern which one of the parents may have regarding the moral climate in which the children are being reared. We do not believe that the 1st and 14th Amendments to the United States Constitution and Article 20, Part First of the Arizona Constitution make church attendance a judicial secret in a child custody case.

Even assuming arguendo that the question concerning the parochial school and church attendance of the minor children may not be considered, the examination of the record indicates that at most, this is a peripheral issue.

The evidence before the court showed that a psychiatrist who examined the plaintiff pursuant to Rule 35(a) of the Rules of Civil Procedure, 16 A.R.S., stipulated to by the parties, described Mrs. Allison as an emotionally unstable personality. The Allison home was described as "pretty messy"; the youngest boy, it was noted, at the age of eight had an extensive vocabulary of four-letter words; the present step-father was seen on two occasions with one of the daughters in questionable situations. There was also evidence adduced from which the court found that "excessive drinking was indulged in in said home", to wit, a next door neighbor testified to seeing Mrs. Allison on the hood of her car in a nightgown screaming "noises", she fell off and was assisted up by her two daughters. A gas station attendant testified that Mrs.

Allison had come into the service station where he worked in various states of drunkeness and on one occasion: . .

"I was coming back around to seal the gas tank off and put the nozzle on, she hollered at me * * * 'Hey, you fat son-of-a-bitch, can't you do a better job than that on the windshield?' "

In addition, there is the trial court's in-chambers conference with the children themselves. Their testimony is not a matter of record, but there is strong indication that the results of this conference bore heavily on the disposition of the matter.

The trial court stated:

"I am aware of this boy Kevin. I talked to him quite at length and my order provides that Kevin is to have a complete psychiatric and psychological evaluation and he was made a ward of this court because I was concerned."

As we have recently stated:

"In chambers conferences between the trial judge and the children of the litigants have been an important part of many domestic relations trials. * * *

"Frequently these conferences are conducted with a promise by the trial judge that the information is confidential, that the child need not repeat what has been said and the judge will not repeat what has been said. It is vital that this confidence be observed.

"In this, one of the most difficult responsibilities of a trial judge, the judge is privileged to consider the information so secured in his final decision. The information given to the trial judge during the in chambers conference may well be the crucial and determining factor in the court's decision. We do not say that if the record is overwhelming in favor one one decision that the in chambers conference alone will be sufficient to sustain a contrary finding for that problem is not before us. In this case, the reported evidence sustains the decision and we must assume that the decision is fortified and strengthened by the in chambers conference." Bailey v. Bailey, 3 Ariz.App. 138, 142, 412 P.2d 480, 484 (1966).

[9] The evidence was more than sufficient from which the

trial court, disregarding any evidence of religious attitudes on church attendance, could find that the best interests of the children dictated a change in custody.

[10] The appellant further contends that the trust established by the parties at the time of the divorce which provides that the children shall attend a Catholic college also violates the 1st and 14th Amendments of the United States Constitution and the Constitution of the State of Arizona.

The trial judge found the defendant failed to provide for support payments for the college-age girls at $100.00 during the summer months, but also found:

> "This court further finds that it would not be equitable for defendant Ovens to be required to furnish college support money twice for the children. That the trust provides for support, maintenance and educational funds for the benefit of the children of the parties as is set forth in paragraph 10 of the original decree entered in this cause December 12, 1958 * * * That the children of the parties, ———— and ————, may choose their own college but in doing so, they or the plaintiff will be required to make the financial arrangements. That this court should not require the defendant to provide funds for any other school not covered under the trust agreement."

Were this matter before the Court in action to set aside the trust agreement, the religious issue might be directly before us. We do not believe that it is before the Court at this time under these facts. In the first place, we are concerned only with the change of custody of the two boys. In the second place, we are not here to determine the obligation of the father to provide a college education for the two girls in question. Any error there may be in that matter is for another determination and we specifically refrain from making any determination concerning the validity of the religious provision contained in such trust.

ATTORNEY'S FEES

[11, 12] The appellant next contends that the trial court

abused its discretion in awarding the amount of $250.00 as and for the plaintiff's attorney. The question is not that this Court would, if called upon, award a different amount which on its face would appear to be inadequate to completely cover Mrs. Allison's total fees in the matter. The law does not require that Dr. Ovens pay for all of Mrs. Allison's fees, but a reasonable amount, and while we may not agree as to the amount awarded, we do not find that the amount awarded was unreasonable under the circumstances.

Judgment of the court below is affirmed.

STEVENS, C. J., and DONOFRIO, J., concur.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF ARIZONA

CHYRL MERTH (OVENS) ALLISON, Appellant, v. JAMES M. OVENS, JR., Appellee.	No. 8941-PR (Supreme Court) No. 1CA CIV-310 (Court of Appeals ORDER

IT IS ORDERED: The Petition for Review filed in the Court of Appeals, Division No. 1, and filed in the Supreme Court of the State of Arizona on February 10, 1967, in the above-entitled cause = GRANTED.

Chife Justice Bernstein and Justice Struckmeyer having announced their disqualification, Judge John P. Collins, Tucson, Arizona and Judge Lloyd C. Helm, Bisbee, Arizona, have been assigned to serve in their stead in the determination of this cause.

DATED at Phoenix, Arizona, this 29th day of March, 1967.

Ernest W. McFarland
Vice Chief Justice

APPENDIX E

433 P.2d 968

———Ariz.———

IN THE SUPREME COURT OF
THE STATE OF ARIZONA

In Banc

CHYRL MERTH (OVENS) ALLISON,
Appellant,

v.

JAMES M. OVENS, JR.,
Appellee.

No. 8941-PR
(Filed Nov. 22, 1967)

Appeal from the Superior Court of Maricopa County
Honorable Kenneth C. Chatwin, Judge
AFFIRMED IN PART, REVERSED IN PART

Opinion of the Court of Appeals, Div. One,
4 Ariz.App. 496, 421 P.2d 929—
VACATED AS TO TEMPORARY CUSTODY

John J. Dickinson — Phoenix
Attorney for Appellant

Charles M. Brewer — Phoenix
Jerry H. Glenn — Phoenix
Attorneys for Appellee

Collins, Judge, Superior Court:

This matter is before us by a petition to review the decision of the Court of Appeals reported in 4 Ariz.App. 496, 421 P.2d 929. We granted the petition for the limited purpose of reviewing the jurisdiction of the trial court to make temporary custody awards of children pending appeal.

The trial court entered judgment modifying a previous decree of divorce relating to the custody of three minor children. The three children were awarded to the father, Dr. James M. Ovens, Jr., and the mother, Chyrl Berth (Ovens) Allison, appealed as to the change of custody relating to two only of the three children.

This case was before us previously (Allison v. Chatwin, 99 Ariz. 99, 407 P.2d 69) pending the appeal thereof in the Court of Appeals. There, the mother of said children sought a review of the decision of the trial court, wherein it fixed a supersedeas bond in the amount of $50,000, which amount was by this court held to be unreasonable and reduced to $4,000.

The trial court, anticipating the appellant might appeal the decision changing custody of the three children, held:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pending any appeal that may be filed, that the care, custody and control of the minor children, Terrance, James Brian, and Kevin, be awarded to the defendant father, in furtherance of any appeal that might be taken herefrom, in order to guard the health, safety and welfare of the heretofore mentioned children, until a final determination may be made."

This holding of the court is contrary to the previous decisions of this court.

Apparently the trial court misinterpreted our previous decisions on this subject, as was suggested by petitioner in the request for review. We were of the opinion that this court had made the rules clear in regard to custody of children on appeal, commencing with Gotthelf v. Fickett, 37 Ariz. 322, 294 P. 837,

on rehearing 37 Ariz. 413, 294 P. 837, and the most recent of which was, of course, Allison v. Chatwin, supra.

Appropos the situation in granting this review was the following statement made on rehearing of the Gotthelf case, supra:

> ". . . *Ordinarily we do not write opinions on such motions {for rehearing}, but, since respondent has suggested our original opinion is in some points confusing to the bar of the state on an important point of practice, we depart from our usual custom.*" [Emphasis supplied.] 37 Ariz. at 414, 294 P. at 840

In our recent decision on Hackin v. Superior Court, ____ Ariz. ____, 425 P.2d 420, we had an opportunity to review Allison v. Chatwin, supra, and stated there in this regard as follows:

> "In Allison v. Chatwin, 99 Ariz. 99, 103, 407 P.2d 69, this Court made clear its view of both the purpose of a supersedeas bond and a lower court's duty with regard thereto:
>
> " 'The purpose of the supersedeas bond is to afford the party appealing from a lower court order to stay any further proceedings in the cause being appealed until such time as the appeal has been ruled upon by the reviewing court. Therefore, *the lower court, upon notice of appeal, should determine as quickly as possible the amount of the supersedeas bond, stay execution for a reasonable time to permit the party appealing to post the bond, and thereby stay and preserve the status quo.* Otherwise the effect might be to render nugatory the purpose of the supersedeas bond.' (emphasis added) . . ." .....Ariz. at ....., 425 P.2d at 421

Since, unlike Hackin, supra, the instant case does involve the custody of children, it would be appropriate to set out here the balance of the paragraph appearing in Allison v. Chatwin, supra, which was omitted in the Hackin opinion. It is as follows:

> ". . . Any other procedure would mean that the whole living conditions and routing of the children would be disturbed by such a transfer in the event the court reversed the lower court's ruling in regard to the custody of the children." 99 Ariz. at 103, 407 P.2d at 71

It seems patently clear to us that insofar as supersedeas is con-

cerned, there is no reason for a distinction between two appeals, the one involving an ordinary change of custody of minor chiltren (Bailey v. Superior Court, 97 Ariz. 293, 399 P.2d 907), and the other case involving a civil appeal not involving change of custody (Hackin v. Superior Court, supra).

The precise question relating to supersedeas, which is presented to us on this review, is whether there is a logical reason for a distinction between two appeals, the one involving an ordinary change of custody of minor children (Bailey v. Superior Court, supra), and the other case being an appeal involving specific findings and order of the trial court relating to the necessity of a temporary change of custody, *pending any appeal,* in order to safeguard the safety, welfare, and care of the minor children (Allison v. Chatwin, supra).

Thus, in the instant case, the trial judge made express findings and an order relating to such temporary custody pending appeal. This court took note of such findings and order in our opinion in Allison v. Chatwin, supra, as follows:

> " 'That it is absolutely essential, in order to guard the safety, welfare and care of the minor children, TERRENCE, JAMES BRYAN, and KEVIN, in the event of an appeal, that they be temporarily awarded to the custody of the defendant father herein, pending said appeal, and in furtherance thereof, until the final determination be made.' " 99 Ariz. at 102, 407 P.2d at 71

Notwithstanding the aforesaid specific findings by the trial court, in Allison v. Chatwin, supra, we stated:

> "It is not within the power of the lower court to award custody of children temporarily pending appeal. This court has held that in the filing of a supersedeas bond, the case shall merely be held in status quo, and the bond shall have no retroactive effect so as to undo or invalidate any act already done. In Application of Lavis, 96 Ariz. 316, 394 P2d 655; Gotthelf v. Fickett, 37 Ariz. 322, 294 P. 837, on rehearing, 37 Ariz. at 102, 407 P.2d at 71

If the rule were otherwise in the instant case, it would necessarily mean that the trial court, by its own act, could enlarge its jurisdiction into a field where it has no jurisdiction, *except to do acts in furtherance of the appeal.* This was never contemplated by the legislature, nor by this court.

In Gotthelf v. Fickett, supra, this court reaffirmed its prior holdings that:

> " 'When the Supreme Court has taken jurisdiction of a case on an appeal no inferior tribunal has any jurisdiction thereof, *except to perform the necessary acts in furtherance of the appeal.*' " 37 Ariz. at 416, 294 P. at 840

See also Sam v. State, 33 Ariz. 421, 265 P. 622, and Navajo Realty Co. v. County National Bank & Trust Co., 31 Ariz. 128, 250 P. 885.

After reiterating the foregoing rule in Gotthelf, supra, this court reasoned logically that there is a distinct difference in the jurisdiction of a trial court relating to "acts in furtherance of an appeal" in an appeal *not* involving a supersedeas bond, as opposed to an appeal such as here, where, *but for the posting of a supersedeas bond,* the two cases might otherwise be the same. In arriving at this distinction this court held (in Gotthelf v. Fickett, supra):

> "We are of the opinion that the minor children of the parties to a divorce proceeding are in a situation somewhat analogous to that of specific property awaiting the disposition of the court. It is the child itself, and not a substitute therefor, which is involved in the decree of the court. It is absolutely essential, in order that justice be done, that the child be properly cared for till its custody be finally determined. For this reason any order made by the superior court pending an appeal, and involving simply the temporary custody of the child, is one in furtherance of the appeal, and not in any way prejudicial to the jurisdiction of this court.
>
> "Suppose, for example, it should appear that the health of the child involved in this case was suffering by its remaining in

Tucson during the pendency of the appeal. Would it be said that it was not in furtherance of the appeal that it be taken from the orphanage where it now is and placed temporarily where its health would be preserved? The question itself indicates the only possible answer. Such order, of course, would be merely a temporary one for the care and safety of the child.

The trial court is obviously in a better position than this court to determine what the immediate needs of the child are, and, when the ordinary appeal bond is given, we think it still retains jurisdiction to make orders guarding the health and safety of the child until a final determination of the appeal by this court, and that such action is in furtherance of the appeal.

"*When, however, a supersedeas bond is given, in many jurisdictions, among which we have held Arizona to be, this by statute destroys the right of the court to make any further order whatever in the proceedings superseded, and in such a case the child must be guarded either, as we have indicated, through juvenile proceedings, or by application to this court for some proper order.* Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473; Ex parte Dupes, 31 Cal.App. 698, 161 Pac. 276; Casebolt v. Casebolt, 170 Ky. 88, 185 SW 510." [Emphasis supplied.] 37 Ariz. at 416, 294 P. at 841

That the facts of the instant case are squarely within Gotthelf, supra, there can be no doubt. Therefore, for a change to be made in the custody of the children pending appeals it would have to be through juvenile proceedings or by application to this court for some proper order. This is the procedure this court has held to be proper and in the best interests of children during appeal.

The view of this court on the purpose and effect of supersedeas, as set out above, has been the law of this state since Gotthelf, supra, and as such was and is controlling in all stages of proceedings of the instant case. Furthermore, this court having previously had this case before it on certiorari pending the appeal of the case in the Court of Appeals, our decision there became, in addition, the express law of the case. This being so, that

opinion of this court should have been followed in all applicable respects in said appeal proceedings.

That part of the Court of Appeals decision in regard to the order for temporary custody is vacated. We hold the lower court was without jurisdiction to order temporary custody of the children pending appeal. In all other respects the judgment of the lower court is affirmed.

John P. Collins, Judge, Superior Court

CONCURRING:

Ernest W. McFarland, Vice Chief Justice

Jesse A. Udall, Justice

Lorna E. Lockwood, Justice

Lloyd C. Helm, Judge, Superior Court

IN THE
SUPREME COURT OF THE
STATE OF ARIZONA

CHYRL MERTH (OVENS) ALLISON, Appellant, v. JAMES M. OVENS, JR., Appellee.	No. 8941-PR FILED Nov. 27, 1967 Clerk Supreme Court

PETITION FOR REHEARING; OR, IN THE ALTERNATIVE, NOTICE OF INTENTION TO PETITION THE UNITED STATES SUPREME COURT FOR A WRIT OF CERTIORARI; PETITION FOR A STAY OF THE MANDATE PENDING REVIEW BY THE UNITED STATES SUPREME COURT; OR, PETITION FOR A TEMPORARY STAY OF THE MANDATE PENDING A PETITION TO THE UNITED STATES SUPREME COURT FOR A STAY OF THE MANDATE PENDING REVIEW BY THE UNITED STATES SUPREME COURT

(ORAL ARGUMENT REQUESTED)

COMES NOW Appellant, by and through her undersigned attorney, and petitions this honorable court as follows:

I.

PETITION FOR REHEARING

Pursuant to Rule 9, Rules of the Supreme Court, appellant petitions this honorable court for a rehearing of the decision in the above-styled cause for the reason that in its decision this

honorable court has ignored the errors committed by trial court and by the Court of Appeals, Division One, in the Court of Appeals decision in this case, 4 Ariz. App. 496, 421 P. 2d 929, in the following respects:

A.

The Court of Appeals, Division One, in its decision, held, contrary to the First and fourteenth Amendments to the United States Constitution, that a trial court may take into consideration the church and Sunday-school habits and the failure of a parent to send children to Catholic schools in determining the fitness of that parent to have custody of minor children.

The holding of the court below flies in the face of the holding of this court in *Smith v. Smith,* 90 Ariz. 190, 367 P. 2d 230, which held such consideration to be a violation of the First and Fourteenth Amendments to the United States Constitution, and Article 20, Part First, of the Arizona Constitution. This court, in its decision, has failed even to discuss this point, has affirmed the trial court's judgment and has approved the Court of Appeals decision, and has ignored or overlooked the following cases cited by appellant, all of which are directly contrary to the court's holding: *Engle v. Vitale,* 370 U.S. 421; *Hacket v. Hacket,* (1958 Ohio App.), 150 NE 2d 431, appeal dismissed 168 Ohio St. 373, 154 NE 2d 820, cited with approval in *Abington School District v. Schemp,* 374 U.S. 203; Wood v. Wood, 39 D. Ch. 523, 168 A. 2d 105; *McLaughlin v. McLaughlin,* 20 Conn. Sup. 278, 138 A. 2d 420; *Stanton v. Stanton,* 213 Ga. 545, 100 SE 2d 289.

B.

In its decision, this court has failed to discuss and has approved the trial court's judgment as to the issue of support for the college-age children and has thus allowed the Court of Appeals to sweep the constitutional question involved under the rug. The question involved was whether the trial judge could alter the

support decree for the college-age children so that the father would not have to support them during the school year because of a trust fund which required them to go to Catholic colleges. In other words, if the college-age children refused to go to Catholic colleges, their support money would be cut off—go to a Catholic college, or go without support. To compel a child whom one is legally ordered to support to go without support is a violation of both the United States and the Arizona Constitutions. *Hacket v. Hacket,* supra, trial court opinion, Ohio Court of Common Pleas, 141 NE 2d 477, affirmed 150 NE 2d 431.

For the foregoing reasons, appellant respectfully petitions this court for a rehearing in the above-styled cause.

II.

NOTICE OF INTENTION TO PETITION THE UNITED STATES SUPREME COURT FOR A WRIT OF CERTIORARI

In the event this honorable court should deny the petition for rehearing filed herewith, appellant files this notice of her intention to petition the United States Supreme Court for a writ of certiorari on the above-styled cause. The grounds on which this petition for a writ of certiorari will be based are that this honorable court, by affirming the trial court's judgment and approving the decision of the Court of Appeals, has acted in violation of the First and Fourteenth Amendments to the United States Constitution in that:

A.

The action of the trial court in basing its order changing the custody of minor children on the religious habits and preferences of the respective parents and on the failure of appellant to send the children to Catholic schools violates the First Amendment to the United States Constitution as applied to the states through

the Fourteenth Amendment to the United States Constitution, in that it deprives appellant of her guaranteed freedom of religion.

B.

The action of the trial court in ordering that there would be no support for the college-age children of the parties during the school year unless they attended Catholic schools violates the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment to the United States Constitution, in that it deprives appellant of her guaranteed freedom of religion. In addition, this order violates the "establishment" clause of the United States Constitution in that a "civil magistrate" has undertaken to enter an order which forces the college-age children of the parties to attend a college of a particular faith.

III.

PETITION FOR A STAY OF THE MANDATE PENDING REVIEW IN THE UNITED STATES SUPREME COURT

In the event this honorable court should deny the petition for rehearing filed herewith, appellant petitions this honorable court for an order staying the mandate in the above-styled cause to allow appellant time to prepare and file a petition for certiorari in the United States Supreme Court, and for that Court to dispose of said petition, in accordance with the Rules of that Court. The petition for certiorari would be based on the points set forth in the notice of intention to petition the United States Supreme Court for a writ of certiorari as set forth in Paragraph III above. Appellant would remind this honorable court that a $4,000 supercedeas bond is still filed in this case and would still be in effect.

IV.

PETITION FOR A TEMPORARY STAY OF THE MANDATE PENDING A PETITION TO THE UNITED STATES SUPREME COURT FOR A STAY OF THE MANDATE PENDING DECISION BY THE UNITED STATES SUPREME COURT

In the event that this honorable court should deny the petition for rehearing and should further deny the petition for an order staying the mandate in the above-styled cause pending a review of this case by the United States Supreme Court, appellant petitions this honorable court for a 30-day stay of the mandate to allow appellant to petition the United States Supreme Court for an order staying the mandate pending the filing and disposition of a petition for certiorari in the United States Supreme Court.

DATED at Phoenix, Arizona, this 27th day of November, 1967.

Respectfully submitted

JOHN J. DICKINSON
224 Luhrs Building
Phoenix, Arizona
Attorney for Appellant

COPY of the foregoing served
this 27th day of November,
1967, on:

CHARLES M. BREWER, ESQ.
216 Luhrs Building
Phoenix, Arizona
Attorney for Appellee

APPENDIX G

SUPREME COURT
STATE OF ARIZONA
PHOENIX

CHERYL MERTH (OVENS) ALLISON, Appellant, v. JAMES M. OVENS, JR., Appellee.	No. 8941-PR

The following action was taken by the Supreme Court of the State of Arizona on January 9, 1968, in regard to the above-entitled cause:

"ORDER: Appellant's motions for rehearing, for stay of the mandate pending review by the U.S. Supreme Court, and for a temporary stay of the mandate pending a petition to the United States Supreme Court — DENIED."

To—John J. Dickinson
224 Luhrs Building
Phoenix, Arizona
Charles M. Brewer
216 Luhrs Building
Phoenix, Arizona

SYLVIA HAWKINSON, Clerk
By Lucile Brooks
Assistant Clerk

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF ARIZONA

To the Honorable the Superior Court of the State of Arizona in and for the County of Maricopa.

Filed Jan. 12, 1968 by Ken Randall, Deputy.

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Maricopa, before you in a cause between

CHERYL MERTH (OVENS) GERBER ALLISON, Plaintiff, v. JAMES M. OVENS, JR., Defendant,	No. 51803 Mandate

Cause No. 51803

said Superior Court entered its judgment on the 13th day of September, 1965, in favor of the defendant and against the plaintiff,

as by the inspection of the record of the said Superior Court, which was brought into the Court of Appeals, Division One, of the State of Arizona by virtue of an appeal by plaintiff .....

.....agreeably to the law in such case made and provided fully and at large appears.

And Whereas, in November, in the year of our Lord one thousand nine hundred and sixty-six, the said cause came on

to be heard before the said Court of Appeals, Division One, and was submitted for decision after argument of counsel.

On Consideration Whereof, it was on the twenty-ninth day of December in the year of our Lord one thousand nine hundred and sixty-six, ordered by said Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby affirmed.

Whereupon, on February 9, 1967, appellant filed a Petition for Review by the Supreme Court, on consideration of which the said Supreme Court on March 29, 1967, ordered that the Petition for Review be granted. On consideration whereof, it was on the 22d day of November, 1967, ordered that part of the Court of Appeals decision in regard to the order for temporary custody is vacated. We hold the lower court was without jurisdiction to order temporary custody of the children pending appeal. In all other respects the judgment of the lower court is affirmed.

You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

Witness, the Honorable Ernest W. McFarland, Chief Justice of the Supreme Court of the State of Arizona, the tenth day of January, in the year of our Lord one thousand nine hundred and sixty-eight.

/s/ Sylvia Hawkinson
Clerk of the Supreme Court
of the State of Arizona

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In The
Supreme Court of the United States

OCTOBER TERM, 1967

No. 1085

CHYRL MERTH (OVENS) ALLISON, *Petitioner*

v.

JAMES M. OVENS, JR., *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

MARK WILMER
400 Security Building
Phoenix, Arizona 85004

and

CHARLES M. BREWER
216 Luhrs Building
Phoenix, Arizona 85003

Attorneys for Respondent

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In The
Supreme Court of the United States

OCTOBER TERM, 1967

No. 1085

CHYRL MERTH (OVENS) ALLISON, *Petitioner*

v.

JAMES M. OVENS, JR., *Respondent.*

OPINIONS BELOW

The opinion of the Court of Apppeals of the State of Arizona, Division One, is reported at 4 Ariz. App. 496, 421 P.2d 929, and the affirming opinion of the Supreme Court of Arizona is reported at ____ Ariz. ____, 433 P.2d 968.

JURISDICTION

The judgment from the Supreme Court of the State of Arizona in controversy is not reviewable because the decision rests on non-federal grounds. The attempt to invoke jurisdiction under 28 USCA § 1257(3) upon the asserted grounds that "a right, privilege and immunity was claimed under the Constitution of the United States" and was denied by the court below (Petition p. 3) is rendered insubstantial because the state court decisions demonstrate that the change of custody of the minor children involved in this case was made and based upon a finding that:

> *"The evidence was more than sufficient from which the trial court, disregarding any evidence of religious attitudes on church attendance, could find that the best interests of the children dictated a change in custody."* (Emphasis supplied).

See 421 P.2d 929, at 936. A state court judgment based upon an adequate and independent non-federal ground even though a federal question may be involved and perhaps wrongly decided, will not be reviewed. *Murdock v. Memphis,* 20 Wall 590, 22 L.Ed. 429; *Berea College v. Kentucky,* 211 U.S. 45, 53 L.Ed. 81; *Fox Film Corp. v. Muller,* 296 U.S. 207, 80 L.Ed. 159, 56 S.Ct. 183. Where state court decisions are predicated on non-federal grounds entirely independent of any federal issue, jurisdiction is defeated; see *Cramp v. Board of Public Instruction,* 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275, and also *Jankovich v. Ind. Toll Road Comm.,* 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493, and see the prodigious number of cases annotated under 28 USCA § 1257 pp. 200-205 which section Petitioner ironically seeks to utilize in invoking jurisdiction.

QUESTIONS PRESENTED

Respondent restates the real questions before this Court:

1. Will certiorari issue to review a state court decision affirming an order changing the custody of minor children upon non-federal grounds that such change was in the best interests of the children in order to protect their health, morals and welfare?

2. Is the evidence of the moral and mental unfitness of Petitioner dictating the change of custody of the minor children adequate to support the state court decision?

STATEMENT OF THE CASE

Petitioner's statement of the case is in most serious need of correction in that it reflects a studied endeavor to omit all facts other than those concerning certain religious aspects, whereas in truth and in fact the decision turned on almost overwhelming evidence to the effect that it was to the best interest of the minor children involved in this proceeding that a change of custody be made for the protection of their health, morals and welfare.

A casual perusal of the state appellate court opinion (A. 12-24) and the unchallenged findings of fact and conclusions of law and judgment entered thereon (A. 1-6) will place in proper focus

the facts chiefly relied upon to remove the young boys from Petitioner's custody. She has twice remarried since her divorce from Respondent. Both new husbands have long and involved criminal records. Evidence was adduced establishing the detrimental influence of these men on the minor children of the parties. (A. 17) The record shows that Petitioner frequently drank to excess both in public and in her home; (A. 2, 20, 21) her neighbors testified that Petitioner maintained a "messy" home and observed her on one occasion standing on the hood of her automobile clothed in a nightgown screaming "just noises", then toppling to the ground necessitating assistance from her minor daughters. (A. 21) Petitioner was often observed in public in various stages of inebriation, using profane language. Her eight year old son undoubtedly influenced by Petitioner's profanity also was given to the repeated use of "four-letter" words. (A. 22) Petitioner was also given to bizarre and lascivious conduct such as tying a blue ribbon on the exposed penis of her eight year old child. (T.R. p. 624, 625) Petitioner's present husband was shown to have embarked on the practice of attending nightclubs with, and was observed on one occasion fondling the breasts of, the eighteen year old daughter of the parties hereto. (A. 18-21)

A Phoenix psychiatrist agreed upon by both parties, examined Petitioner and concluded that it was "disadvantageous for her to be around the children," and further, "she was of an emotionally unstable personality" and "if her condition is reversible at all, it would take a long period of time, five to ten years, which does not give much time for improvement in the presence of young children" (A. 21, t.r. pp. 213, 237). A former teacher of one of the minor boys testified that when the child lived with Petitioner his grades were exceptionally low and that he was emotionally unstable, often physically ill, and frequently trembled and cried when forced to return to the home of the Petitioner; that on one occasion Petitioner ordered the child to walk some fifty-nine blocks home from school as punishment (t.r. pp. 171, 179, 184, 189).

Conversely, the trial court found as a fact that the Respondent had remarried a highly respected widow who maintained an

orderly home and was devoted to the Ovens children. The court further found that the environment of Dr. Ovens' home was conducive to a wholesome life for the minor children, and further, that they were assisted with their school work, well groomed, and adequately clothed, as opposed to the children's plight when forced to live with Petitioner. (A 1, Finding of Fact [a, b, f, i]), and also A-20 of state court opinion).

REASONS FOR DENYING THE WRIT

Given the fact that the evidence supports a finding that Petitioner was an unfit and improper person to have custody of the minor children of the parties it will appear that the state court decisions were and are correct. The Arizona courts have uniformly held that the sole question for decision on a petition for change of custody is the "best interests" of the children. In this the trial court exercises wide discretion. See *In re Guardianship of Rodgers,* 100 Ariz. 269, 413 P.2d 744; *Andro v. Andro,* 97 Ariz. 302, 400 P2d 105. The Arizona appellate courts will not interfere with the trial judge's judgment regarding a change of child custody unless a manifest abuse of discretion is shown. *Ward v. Ward,* 88 Ariz. 130, 353 P.2d 895; *Bailey v. Bailey,* 3 Ariz.App. 138, 412 P.2d 480; *Grimditch v. Grimditch,* 71 Ariz. 237, 226 P.2d 142; *Gotthelf v. Gotthelf,* 38 Ariz. 369, 300 Pac. 186; *McFadden v. MvFadden,* 22 Ariz. 246, 196 Pac. 452; *Bradstreet v. Bradstreet,* 34 Ariz. 340, 271 Pac. 717. See also *Keezer, Marriage and Divorce,* 3rd Ed. § 725 and *Tiffany on Domestic Relations,* p. 350.

In order to insure the welfare of children after entry of a decree of divorce, the Arizona law gives the court continuing jurisdiction in custody cases; A.R.S. § 25-321:

> "The court may from time to time after entry of final judgment, on petition of either party * * * amend, change or alter any provision of the judgment respecting the care, custody or maintenance of the children of the parties as circumstances of the parents and welfare of the children require."

The decision of the Arizona Court of Appeals (affirmed on this point by the Supreme Court of the State of Arizona) com-

pletely dispells the question raised by the Petitioner to the effect that only "a religious issue" was considered, see *Allison v. Ovens,* 421 P.2d 929, at 935:

> "Even assuming arguendo that the question concerning the parochial school and church attendance of the minor children may not be considered, *the examination of the record indicates that at most this is a peripheral issue.*" (Emphasis supplied)

It is made abundantly clear that the decision affirming the change of custody was and may be sustained solely upon the grounds that the health, morals and welfare of the children demanded such change entirely independent of any constitutional rights, privileges or immunities. This court has never rendered an advisory opinion. If, after review correcting any claimed infringement of a constitutional right or privilege, the same judgment (i.e. changing the custody of the minor children from Petitioner to Respondent herein) could result, said review would amount to nothing more than an advisory opinion, *Herb v. Pitcairn,* 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459, and this destroys jurisdiction.

The entire record amply demonstrates that Petitioner has embarked upon a course of conduct which the Arizona courts have found inimical and detrimental to the best interests of the minor children of the parties. Even Petitioner's recital of the history of this case reveals that the court was compelled to remove other minor children from Petitioner's custody. Her attitude, activities, and conduct both inside and outside of the family home establish Petitioner as an unfit person to have custody. On this basis every case cited by Petitioner is made inapplicable; first, because this case is merely a domestic relations matter affecting only the private interests of the parties in which the state courts have recognized that the health, welfare, morals and best interests of the children would be served by removing them from the custody of the Petitioner—this is an area of litigation which this court has rarely, if ever, entered; second, it should be observed that each Federal case cited was decided exclusively upon the grounds that there existed an unwarranted intrusion by a state

or municipal body, into the rights of others protected by the First and Fourteenth Amendments of the United States Constitution; further each state court decision cited reveals that the wife was conceded to be a fit and proper person to have custody of the children, the only controversy appearing was the question of religious training. For example, see *Stanton v. Stanton* (Ga.) 100 S.E.2d 289, at 292; *McLaughlin v. McLaughlin* (Conn.) 132 A.2d 420, at 421; *Hackett v. Hackett* (Ohio) 150 N.E.2d 431, at 434.

In the instant case the evidence warrants a finding that the mother (Petitioner) was and is morally unfit and mentally unsuitable to have the custody of the children. The fact that the Arizona courts have observed and make mention that these children were not getting any religious training whatsoever does not warrant review. Petitioner has simply been found lacking as a parent. See *Schreifels v. Schreifels,* 47 Wash.2d 409, 287 P.2d 1001. The petition does not disclose any public interest to be affected.

CONCLUSION

The Petitioner has demonstrated no reason whatsoever why this Court should return to her the custody of the minor boys. It affirmatively appears that Petitioner does not raise any adequate federal ground which may be said to have controlled the state courts' decision to remove the children from her custody. It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Hereby Certify that three true copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari were delivered to John J. Dickinson, Esq., 224 Luhrs Building, Phoenix, Arizona, 85003, this ____ day of March, 1968.

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